MEMORANDUM OF LAW

DATE: March 26, 1986
TO: Richard Hays, Deputy Director, General Services Department via Terry Flynn, Director, General Services Department
FROM: City Attorney
SUBJECT: Overweight Vehicles

By memorandum dated February 7, 1985, you requested our opinion concerning the City's responsibility for overweight violations by operators of refuse collection trucks. Your memorandum set forth the Division's policies and advised that drivers are indoctrinated on weight limits, that such limits are conspicuously posted on each truck, and that operators are disciplined for violations. You further indicate that though there is no onboard scale, experienced drivers can estimate the weight of the load on a regularly assigned truck by the position of the packing blade and their familiarity with a regular route and the type of load generated on that route. You further indicate that the Division's policy is to actively require drivers to adhere to all requirements of the Vehicle Code.

From a legal perspective, we would conclude that the City should ordinarily not be responsible under Vehicle Code section 40001 for overweight violations by the driver. The driver may be considered solely responsible, just as he would be for a moving traffic violation such as speeding, provided that City is not held to have allowed overloading to occur.

Vehicle Code section 35551 establishes weight limits for vehicles based on the number of axles and the distance between the extremes of any group of two or more consecutive axles. Vehicle Code section 40001 provides in pertinent part:

> (a) It is unlawful for the owner, or any other person, employing or otherwise directing the driver of any vehicle to cause the operation of the vehicle upon a highway in any manner contrary to law.
>
> (b) It is unlawful for an owner to request, cause, or permit the operation of any vehicle:
>
> . . .
>
> (3) Which does not comply with the

size, weight, or load provisions of this code.

Subsection (c) provides that whenever a violation under either of the foregoing subsections is made chargeable to the owner, the driver shall not be cited or arrested unless the violation is for an offense that is clearly within the responsibility of the driver. Subsection (d), however, allows the owner to request that the driver or any other person responsible for the loading, maintenance or operation be made a codefendant. If the codefendant is held solely responsible and found guilty, the court may dismiss the charge against the owner.

Vehicle Code section 40003 allows an employee who is prosecuted for equipment, weight and loading violations to request the court to make the employer a codefendant. That section provides as follows:

> Whenever an employee is prosecuted for a violation of any provision of this code, or regulations promulgated pursuant to this code, relating to the size, weight, registration, equipment, or loading of a vehicle while operating a vehicle he was employed to operate, and which is owned by his employer, the court shall on the request of the employee take appropriate proceedings to make the owner of the vehicle a codefendant. In the event it is found that the employee had reasonable grounds to believe that the vehicle operated by him as an employee did not violate such provisions, and in the event the owner is found guilty under the provisions of Section 40001, the court may dismiss the charges against the employee.
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> In those cases in which the charges against the employee are dismissed, the abstract of the record of the court required by Section 1803 shall clearly indicate that such charges were dismissed and that the owner of the vehicle was found guilty under Section 40001.

Thus in determining whether the City bears criminal responsibility for a weight violation, the analysis is directed to whether the violation was requested, caused or permitted by the City, to paraphrase Vehicle Code section 40001(b)(3).

The purpose of Vehicle Code section 40001 based upon case law construing a preceding statute, the Vehicle Code of 1935, section

731 (stats. 1935, C.27, p.236), is to prevent owners from requiring a vehicle to be operated illegally. As the court stated in Rupley v. Winkler, 147 Cal.App.2d 168, 171; 304 P.2d 867 (1956), hearing denied February 13, 1957:

> The offense is not the requiring of the operation of the vehicle on the highway alone, but the requiring of the operation of the vehicle on the highway "in any manner contrary to law." Thus if the owner requires the driver to operate his vehicle on the highway in a manner contrary to law, he obviously knows that the vehicle will be operated illegally if his directions are carried out. It is the intentional doing of the prohibited act, regardless of good motive or ignorance of its criminal character, which supplies the criminal intent necessary to commit the offense. (Citations omitted; emphasis added.)

The Vehicle Code of 1935, section 731, used the verb "require." The corresponding clause of section 40001(a) uses the verb "cause." Section 40001(b)(3), regarding load violations, is now predicated upon the verbs "(t)o request, cause, or permit," whereas its predecessor, section 690 of the Vehicle Code of 1935, used the verbiage: "to cause or knowingly permit" (stats. 1935, C.27, p.227).

The difference between the words "require," "request," "cause" and "permit" as used in the earlier statute and Rupley v. Winkler, supra, and as used in section 40001(b)(3) is one of context.

"Cause" is defined in Webster's Dictionary as "to bring into existence: . . . to effect by command, authority or force (e.g.) the president caused the ambassador to protest." Black's Law Dictionary (5th Ed.) defines the verb "cause" as "(t)o be the cause or occasion of; to effect as an agent; . . . to bring into existence; to make to induce; to compel."

Webster's defines the verb "require" as "to ask for authoritatively or imperatively." Black's defines "require" as "(t)o direct, order, demand, instruct, command, claim, compel, request, need, exact. . . . To ask for authoritatively or imperatively." See also, People v. Robinson, 222 Cal.App.2d 602, 608; 35 Cal. Rptr. 344 (1963) defining "require" as "to ask for," "to call for," or "to demand as necessary."

"Request" is defined in Webster's as "to ask . . . to do something. "The verb "permit," on the other hand, which is used

only in section 40001(b)(3), according to Webster's Dictionary means "to consent to expressly or formally; grant leave for or the privilege of: allow, tolerate . . . authorize . . . ." Black's Dictionary defines "permit" similarly: "to suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." There is both a passive and an active sense to the verb "permit." We do note that section 40001(b)(3) does not include the word "knowingly," whereas section 690 of the Vehicle Code of 1935 did.

Although each of these words can also have other meanings, depending on the context, they appear synonymous for purposes of the intent of the owner's responsibility law as interpreted by Rupley v. Winkler, supra, where the verbiage is the language of active rather than passive involvement. Thus, we conclude responsibility attaches to the owner under section 40001(b)(3) where the owner actively causes, requires, or otherwise tolerates or participates in the violation by the driver. Absent some degree of complicity or involvement, responsibility should not exist on the part of the City for the driver's violation.

Conversely, the driver in the field actually performs the loading function. He is responsible for the placement of the load, estimating the usable capacity of the truck, ensuring that the load is carried properly, and so on. Because the pickup routes are regular, and you have indicated that it is possible to estimate the weight of each refuse container or bag, as well as the apparent weight on the axles by the "feel" of the steering, it is within the driver's control to determine when the truck has a certain load on board. This driver's experience is further substantiated by the fact that the trucks are routinely weighed at the disposal site when loaded. Unless the driver has received a specific contrary directive from a supervisor, he cannot claim that he is not responsible or that someone else actually caused the violation to occur.

We note however, that the word "permit," as used in section 40001(b)(3) can also be used in the context of acquiescence in, or condonation of, a particular practice. Although not referred to in your memorandum, we are aware of a practice in your Division involving the "work incentive" program which allows the driver to leave work after he has completed his route and yet be

paid for eight hours. This practice is common in the private sector also, since the advantage is that refuse is removed quickly and morale enhanced. Although your drivers are prohibited from overloading a truck and are supposed to make at

least two trips to the disposal site, the question still remains whether the City by adopting a "work incentive" program is inducing a practice whereby drivers will attempt to complete a route quickly at the expense of prudent loading practices.

Obviously, the work incentive program cannot be ignored in the overloading problem, in so far as it may allow the verb "permit," as used in section 40001(b)(3) to be construed in the context of condonation of a practice which may lead to overloading by the driver.

It is recommended that any policy directed to the driver's responsibility, or the responsibility of the driver II where assigned, be set forth in a written directive. To the extent possible, objective written procedures to ensure adherence to weight limits should be set forth. Discipline of employees and development of onboard measurement devices or indicators should also continue to be vigorously pursued to minimize City liability for driver violations.

JOHN W. WITT, City Attorney
By
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Deputy City Attorney

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